

Amanah Raya Bhd v Mesiniaga Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT
NO WA-22NCVC-91-02 OF 2017
ROHANI ISMAIL JC
6 SEPTEMBER 2019

Civil Procedure — Ex parte order — Setting aside ex parte order — Whether there were sufficient grounds for granting ex parte order for committal proceeding — Whether contemnor's statement disclosed sufficient grounds — Whether non-disclosure of sufficient grounds was material — Rules of Court 2012 O 42 r 13 & O 52 r 3

This was an application by John Carleton Kelley ('the proposed contemnor') pursuant to O 42 r 13 of Rules of Court 2012 ('the ROC 2012') and inherent jurisdiction of the court for setting aside the ex parte order dated 2 April 2019 granting leave to the plaintiff to commence committal proceedings against the proposed contemnor pursuant to O 52 r 3 of the ROC 2012. It was contended that: (a) there were no circumstances that gave rise to any cause for committal proceedings taken out against the proposed contemnor; (b) the statement dated 21 March 2019 did not disclose sufficient grounds for granting the order; and (c) there are serious material non-disclosures on the part of the plaintiff in applying for the order.

Held, allowing application to set aside ex parte order with costs of RM3,500:

- (1) The relevant procedural law for committal proceedings was O 52 of the ROC 2012. It was clear that no application for a committal order could be made without the leave of court and any failure to comply with the requisite procedure was fatal. It was found that the plaintiff had failed to set out in sufficient detail within the four corners of the statement to enable the proposed contemnor to appreciate the act of contempt that was alleged against him. The alleged act of contempt in the statement was not particularised in detail. The leave to commence committal proceedings was obtained on an ex parte basis on the absence of other parties (see paras 11–13).
- (2) The court found that the explanation given by the proposed contemnor regarding the omissions in his curricular vitae on his employment and criminal conviction would not in fact affected his credibility in giving evidence as an expert witness on the technical aspects of the information technology which featured were in dispute as the court would not rely on the proposed contemnor's evidence alone because the court had to

A evaluate the evidence as a whole before arriving to a conclusion of a trial. The court was satisfied that the role of proposed contemnor would be limited to his expert evidence only and the previous convictions was irrelevant as there was no requirement under O 40A of the ROC 2012 (see paras 20 & 22).

B **[Bahasa Malaysia summary]**

Ini adalah permohonan oleh John Carleton Kelley ('kontemnor yang diusulkan') dengan menggunakan A 42 k 13 Kaedah-Kaedah Mahkamah 2012 ('KKM 2012') dan bidang kuasa mahkamah yang sedia ada untuk
C mengetepikan perintah ex parte bertarikh 2 April 2019 yang telah memberi kebenaran kepada plaintif untuk memulakan prosiding komital terhadap kontemnor yang diusulkan menurut A 52 K 3 KKM 2012. Telah dihujahkan bahawa: (a) tidak ada keadaan yang menimbulkan alasan untuk proses komital yang dimulakan terhadap kontemnor yang diusulkan; (b) pernyataan bertarikh
D 21 Mac 2019 tidak menyatakan alasan yang mencukupi untuk membenarkan perintah itu; dan (c) terdapat perkara serius yang tidak didedahkan oleh pihak plaintif semasa memohon perintah itu.

E **Diputuskan**, membenarkan permohonan untuk menolak perintah ex parte dengan kos sebanyak RM3,500:

- (1) Undang-undang prosedural yang relevan untuk prosiding komital adalah A 52 KKM 2012. Jelas bahawa tidak ada permohonan untuk perintah komital yang dapat dibuat tanpa kebenaran mahkamah dan kegagalan
F untuk mematuhi prosedur yang diperlukan tersebut adalah serius. Didapati bahawa plaintif telah gagal memberikan maklumat yang cukup dalam *four corners* dalam pernyataan tersebut untuk membolehkan kontemnor yang diusulkan itu dapat menghayati tindakan penghinaan yang didakwa terhadapnya. Tuduhan penghinaan yang dinyatakan dalam pernyataan itu tidak dinyatakan secara terperinci. Kebenaran
G untuk memulakan prosiding komital yang diperolehi secara ex parte adalah disebabkan ketiadaan pihak lain (lihat perenggan 11–13).
- (2) Mahkamah berpendapat bahawa penjelasan yang diberikan oleh kontemnor yang diusulkan mengenai ketiadaan, akibat tidak
H dimasukkan, mengenai pekerjaannya dan sabitan jenayah di dalam curricular vitaenya sebenarnya tidak mempengaruhi kredibilitinya dalam memberikan keterangan sebagai saksi pakar mengenai aspek teknikal berkenaan teknologi maklumat yang sedang dibicarakan kerana mahkamah tidak akan bergantung kepada bukti yang dicadangkannya
I semata-mata kerana mahkamah harus menilai bukti secara keseluruhan sebelum memberikan kesimpulan untuk perbicaraan tersebut. Mahkamah berpuas hati bahawa peranan kontemnor yang diusulkan hanya akan terbatas pada bukti berdasarkan kepakarannya dan sabitan sebelum ini terhadapnya tidak relevan kerana tidak ada syarat di bawah

A 40A KKM 2012 (lihat perenggan 20 & 22).]

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Cases referred to

Datuk S Nallakaruppan & Ors v Datuk Seri Anwar bin Ibrahim and other appeals [2015] 4 MLJ 34, CA (refd)

Tan Sri Dato' (Dr) Rozali Ismail & Ors v Lim Pang Cheong @ George Lim & Ors [2012] 3 MLJ 458, HC (folld)

Tan Sri G Darshan Singh v Tetuan Azam Lim & Pang [2013] 5 MLJ 541, CA (refd)

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Legislation referred to

Evidence Act 1950 s 52

Rules of Court 2012 O 29 r 1(2A), O 40A, O 40A r 3, O 42 r 13, O 52, O 52 r 3

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Maizura bt Mohamed Amin (Mohanadass Partnership) for the plaintiff.

Peter Justin Skelchy (Nuraini bt Daud Ali with him) (Cheah Teh & Su) for the defendant.

James Khong (Edwin Lim with him) (James Khong) for the proposed contemnor.

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Rohani Ismail JC:

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INTRODUCTION

[1] Enclosure 94 is an application by John Carleton Kelley/the proposed contemnor pursuant to O 42 r 13 of the Rules of Court 2012 ('the ROC 2012') and/or the inherent jurisdiction of the court for the following orders:

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(a) that the ex parte order dated 2 April 2019 granting leave to the plaintiff to commence committal proceedings against John Carleton Kelley/the proposed contemnor pursuant to O 52 r 3 of the Rules of Court 2012 be set aside;

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(b) that the costs of this application be paid by the plaintiff; and

(c) such further and/or other reliefs as this honourable court deems fit.

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[2] The grounds for the application can be summarised as follows:

(a) there are no circumstances in this case that give rise to any cause for committal proceedings to be taken out against the proposed contemnor;

(b) the statement dated 21 March 2019 does not disclose sufficient grounds for the granting of the order; and

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(c) there are serious material non-disclosures on the part of the plaintiff in applying for the order.

A DECISION OF THE COURT

- [3] Having perused all the cause papers filed in this application and after considering the submissions of the parties, the court allows the proposed contemnor's application in encl 94 to set aside the ex parte order dated 2 April 2019 ('ex parte order') with costs of RM3,500 to be paid by the plaintiff to the proposed contemnor.
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THE FINDINGS OF THE COURT

C *The principle of law*

- [4] On setting aside any order or judgment of the court, O 42 r 13 of the ROC 2012 provides:

- D** 13 Save as otherwise provided in these Rules, where provisions are made in these Rules for the setting aside or varying of any order or judgment, a party intending to set aside or to vary such order or judgment shall make an application to the Court and serve it on the party who has obtained the order or judgment within thirty days after the receipt of the order or judgment by him.

E *Contempt of court*

- [5] The definition of contempt of court in general is defined in *Oswald's Contempt of Court* (3rd Ed) at p 6:

- F** To speak generally, contempt of court may be said to be constituted by any conduct that tends to bring the authority and administration of the law into disrespect or disregard, or to interfere with or prejudice parties, litigants, or their witnesses during litigation.

G ORDER 52 OF THE ROC 2012

- [6] The procedure to be complied with in an application for committal proceeding is laid down in O 52 r 3 of the ROC 2012 where it provides:

- H** 3(1) No application to a Court for an order of committal against any person may be made unless leave to make such an application has been granted in accordance with this rule.

- (2) An application for such leave must be made ex parte to the Court by a notice of application supported by a statement setting out the name and description of the applicant, the name, description and address of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit, to be filed before the application is made, verifying the facts relied on.
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- [7] The Federal Court in the case of *Tan Sri Dato' (Dr) Rozali Ismail & Ors v Lim Pang Cheong @ George Lim & Ors* [2012] 3 MLJ 458 explained the

power of the court to punish for contempt where at p 467 it states:

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[21] The jurisprudence for arming the court with the power to punish a contempt is best expounded by Brown J in *Re HE Kingdon v SC Goho* [1948] MLJ 17 as follows:

But the root principle on which this inherent power to punish for contempt is founded, the purpose for which it must be exercised, is not to vindicate the dignity of the individual judge or other judicial officer of a court or even of the court itself, but to prevent an undue interference with the administration of justice in the public interest.

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[22] Hence, the power to punish a contempt is not derived merely from statute nor truly from common law but instead flows from the very concept of a court of law (see Borrie & Lowe's *The Law of Contempt* (3rd Ed), at p 465; and Master Jacob (1970) 23 *Current Legal Problems* 23).

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[23] Article 126 of the Federal Constitution empowers the Federal Court, the Court of Appeal and the High Courts to punish any contempt of itself. This is repeated in s 13 of the Court of Judicature Act 1964. However since the RFC has no procedural provision on committal, therefore, by virtue of r 3 of the RFC, the procedure under O 52 of the RHC may be adopted. Thus, an applicant can bring contempt proceedings via O 52 of the RHC without having to go through the Criminal Procedure Code or the Penal Code even if the relief sought is imprisonment (see *Chandra Sri Ram v Murray Hiebert* [1997] 3 MLJ 240; *Arthur Lee Meng Kwang v Faber Merlin Malaysia Bhd & Ors* [1986] 2 MLJ 193 and *Chung Onn v Wee Tian Peng* [1996] 5 MLJ 521).

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[29] It is settled law that committal proceedings is criminal in nature since it involves the liberty of the alleged contemnor. Premised upon that, the law has provided procedural safeguards in committal proceeding which requires strict compliance. In this regard, Cross J in *Re B (JA) (An Infant)* [1965] Ch 1112 had this to say:

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Committal is a very serious matter. The courts must proceed very carefully before they make an order to commit to prison; and rules have been laid down to secure that the alleged contemnor knows clearly what is being alleged against him and has every opportunity to meet the allegations. For example, it is provided that there must be personal service of the motion on him even though he appears by solicitors, and that the notice of motion must set out the grounds on which he is said to be in contempt; further, he must be served as well as with the motion, with the affidavits which constitute the evidence in support of it.

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It is clear that if safeguards such as these have not been observed in any particular case, then the process is defective even though in the particular case no harm may have been done. For example, if the notice has not been personally served the fact that the respondent knows all about it, and indeed attends the hearing of the motion, makes no difference. In the same way, as is shown by *Taylor v Roe*, if the notice of motion does not give the grounds of the alleged contempt or the affidavits are not served at the same time as the notice of motion, that is a fatal

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- A defect, even though the defendants gets to know everything before the motion comes on, and indeed answers the affidavits.
- B When, however, one passes away from safeguards which are laid down in the interests of the contemnor and comes to consider mere verbal deficiencies in the documents in question — cases where the documents do not comply strictly with the rules, but it is impossible that in any conceivable case the contemnor could be in any way prejudiced by the defects — then it seems to me that there is no reason why the courts should be any slower to waive such technical irregularities in a committal proceeding than they would in any other proceeding. (Emphasis added.)
- C [30] In similar tone, Lord Denning MR in *McIlraith v Grady* [1968] 1 QB 468 said at p 477:
- D The second appeal is as to the committal order. Here we must remember the fundamental principle that no man's liberty is to be taken away unless every requirement of the law has been strictly complied with.
- E [8] In the present case, the proposed contemnor alleges that the application filed in encl 94 premised on the ground that the ex parte order dated 2 April 2019 granting leave to the plaintiff to commence committal proceedings against John Carleton Kelley/the proposed contemnor pursuant to O 52 r 3 of the ROC 2012 be set aside as it was wrongly obtained. The Court of Appeal in the case of *Tan Sri G Darshan Singh v Tetuan Azam Lim & Pang* [2013] 5 MLJ 541 at p 549 held:
- F Any question whether the ex parte to commence committal proceedings was wrongly obtained must be dealt with first since it is the foundation in the process of committal proceedings. Two wrongs do not make a right. A court of law will not lightly allow its processes to be abused. If the process of the court was wrongly used to obtain the ex parte order for leave, that leave will be set aside first.
- G [9] Rules governing committal proceedings are mandatory in nature and must be strictly adhered to. As a procedural safeguard, leave to commence committal proceedings must first be obtained. To do so, the Rules specifically provide that an applicant can file a notice of application, a statement and an affidavit verifying the statement for purposes of applying for leave to commence committal proceedings.
- H [10] It is settled law that:
- I (a) the grounds for committal must be set out in sufficient detail within the four corners of the statement to enable the respondent to appreciate the act of contempt that is alleged;
- (b) the statement is to be supported by an affidavit verifying the facts in the statement;

- (c) the applicant must first obtain leave to commence committal proceedings; and A
- (d) no other affidavits can be filed in the committal proceedings to supplement or cure any deficiencies in the statement at a later time. B

[11] As the subject of the setting aside application herein is the ex parte order which was obtained on the statement and affidavit verifying statement under the Rules, the proposed contemnor submits that the applicant ie the defendant, therefore is not entitled to add on further affidavit evidence to justify the ex parte order which has already been obtained and/or to supplement or cure any deficiencies of the statement. Procedure in committal proceedings is mandatory in nature and must be strictly adhered to as held by the Federal Court in *Tan Sri Dato' (Dr) Rozali Ismail & Ors v Lim Pang Cheong @ George Lim & Ors* [2012] 3 MLJ 458 where it states: C

[29] It is settled law that committal proceeding is criminal in nature since it involves the liberty of the alleged contemnor. Premised upon that, the law has provided procedural safeguards in committal proceeding which requires strict compliance. In this regard, Cross J in *Re B (JA) (An Infant)* [1965] Ch 1112 had this to say: D

Committal is a very serious matter. The courts must proceed very carefully before they make an order to commit to prison; and rules have been laid down to secure that the alleged contemnor knows clearly what is being alleged against him and has every opportunity to meet the allegations. E

[12] The relevant procedural law for committal proceedings in this instance is O 52 of the ROC 2012 and that it is clear no application for a committal order can be made without the leave of court and any failure to comply with the requisite procedure is fatal. The Federal Court in *Tan Sri Dato' (Dr) Rozali Ismail & Ors* at p 37 gave the strictest treatment to the said Rules: F

[37] We wish to state in clear term that the alleged act of contempt must be adequately described and particularised in detail in the statement itself. The accompanying affidavit is only to verify the facts relied in that statement. It cannot add facts to it. Any deficiency in the statement cannot be supplemented or cured by any further affidavit at a later time. The alleged contemnor must at once be given full knowledge of what charge he is facing so as to enable him to meet the charge. This must be done within the four walls of the statement itself. G H

[13] Going through this application and in the circumstances of the case, the court finds that the plaintiff has failed to set out in sufficient detail within the four corners of the statement to enable the proposed contemnor to appreciate the act of contempt that was alleged against him. The alleged act of contempt in the statement was not particularised in detail. The leave to commence committal proceedings was obtained on an ex parte basis in the absence of other parties. The Court of Appeal case of *Tan Sri G Darshan Singh* held: I

- A It must also be borne in mind that the application for leave to commence committal proceedings is made ex parte. *To enable the court to make a fair and just decision, it must necessarily have all the relevant facts before it. In an ex parte application it means that the applicant must set out the facts fairly, including the facts that are likely to be raised by the proposed alleged contemnor in objecting to the application if it were an inter*
- B *parte application.* If any fact is likely disputed by the other party by the other party, the applicant must say so and give his reasons why such dispute is unsustainable, or is irrelevant or immaterial. There is no reason not to be able to do so for after all only the applicant has the opportunity to be heard upon it in the ex parte application. *It certainly does not mean the applicant is entitled to merely state the facts favouring his*
- C *application and the court must rely on that alone. Otherwise the leave procedure would cease to be a safeguard and instead easily become a tool exploited for oppression.* (Emphasis added.)

[14] From the above mentioned, it is clear that:

- D (a) when applying for leave to commence committal proceedings, it is incumbent upon the applicant to produce all the relevant facts before the court;
- E (b) given the ex parte nature of the leave application, the applicant must set out all the facts in its statement verified by an affidavit;
- (c) in so doing, the applicant is also obligated to disclose the facts likely to be raised or disputed by the proposed contemnor in the event of a setting aside application; and
- F (d) likewise, the applicant is given the opportunity at the ex parte stage to give reasons as to why such an anticipated dispute by the proposed contemnor is unsustainable or is irrelevant or is immaterial.

- G The full facts set out in the statement are necessary and the procedural law relating to the contempt proceedings must be strictly adhered as a safeguard which cannot be compromised.

- H [15] The proposed contemnor is not a party in this suit and he is to be called by the defendant as an expert witness where his participation would be as an independent expert to assist the court in the findings of facts with regard to the technical aspects of the information technology which is the subject matter in dispute before the court. The proposed contemnor affirms that he understands his duty to the court to as an expert witness and states that he has no intention to mislead the court at any time whether by way of deliberate omission or in
- I providing any false information as alleged by the plaintiff.

[16] In the affidavit dated 7 May 2019 (refer encl 102) at para 14.2, the proposed contemnor avers that he had not disclosed the fact he was convicted by the United States Court of Appeals, District of Columbia Circuit of

criminal offences for which he had served a sentence of 43 months imprisonment and had paid the fine imposed in his expert report as the provision under O 40A of the ROC 2012 does not require him to do so. Therefore, the proposed contemnor denies that his expert report is incomplete or inaccurate.

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[17] On the plaintiff's allegation that the proposed contemnor had given false information and/or evidence in relation to his employment history in exh 'JCK', where had stated that he was employed as CIO of the Food and Agriculture Organization of the United Nations and Deputy CIO for the US Agency for International Development and/or there was a continuous employment for the period during which he was serving the sentence in respect of the conviction against him, the court finds that the proposed contemnor has filed a corrective affidavit dated 22 March 2019 marked as exh 'PC3' in encl 102 (refer also encl 71) rectifying the typographical error in exh 'JCK1' that he was employed from 1982–1989 and not from 1982–1999.

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[18] The proposed contemnor also prays that the court would disregard the plaintiff's affidavit (1) (refer encl 85) and the plaintiff's affidavit (2) (refer encl 86) when considering the plaintiff's application for ex parte order in encl 81 as the contents therein are beyond that of the statement.

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[19] Further, the proposed contemnor states that the plaintiff has failed to comply with O 29 r 1(2A) of the ROC 2012 or such requirements in law to in moving the court on an ex parte basis as the plaintiff has failed:

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- (a) to provide any answer that the proposed contemnor is likely to assert in relation to encl 81; and
- (b) any facts which may lead the court not to grant leave to commence committal proceedings.

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[20] Having perused all the affidavits filed by the proposed contemnor and the plaintiff and upon considering the submissions of the parties, the court finds that the explanation given by the proposed contemnor regarding the omissions in his CV on his employment and criminal conviction would not in fact, affects his credibility in giving evidence as an expert witness on the technical aspects of the information technology which features are in dispute as the court would not rely on his evidence alone because the court has to evaluate the evidence as a whole before arriving to a conclusion of the trial.

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[21] Order 40A r 3 of the ROC 2012 provides:

Requirements of expert's evidence (O 40A r 3)

- A** 3(1) Unless the Court otherwise directs, expert evidence to be given at the trial of any action, is to be given in a written report signed by the expert and exhibited in an affidavit sworn to or affirmed by him testifying that the report exhibited is his and that he accepts full responsibility for the report.
- B** (2) An expert's report shall —
- (a) give details of the expert's qualifications;
 - (b) give details of any literature or other material which the expert witness has relied on in making the report;
 - (c) contain a statement setting out the issues which he has been asked to consider and the basis upon which the evidence was given;
 - (d) if applicable, state the name and qualifications of the person carried out any test or experiment which the expert has used for the report and whether or not such test or experiment has been carried out under the expert's supervision;
 - (e) where there is a range of opinion on the matters dealt with in the report —
 - (i) summarise the range of opinion; and
 - (ii) give reasons for his opinion;
 - (f) contain a summary of the conclusions reached;
 - (g) contain a statement of belief of correctness of the expert's opinion; and
 - (h) contain a statement that the expert understands that in giving his report, his overriding duty is to the Court and that he complies with that duty.

- F** [22] Therefore, from the above-mentioned the court is satisfied that the role of the proposed contemnor as specified under O 40A of the ROC 2012 would be limited to his expert evidence only and that his previous conviction is irrelevant as there is no requirement under O 40A of the ROC 2012 to disclose the same in his expert report marked as 'JCK1'. Going through the O 40A of the ROC 2012 itself, it is clear that the said order makes no requirement for the expert witness to disclose his previous convictions.
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- H** [23] The s 52 of the Evidence Act 1950 (Act 56) provides:
- In civil cases the fact that the character of any person concerned is such as to render probable or improbable any conduct imputed to him is irrelevant, except do far as his character appears from facts otherwise relevant.

- I** The Court of Appeal in the case of *Datuk S Nallakaruppan & Ors v Datuk Seri Anwar bin Ibrahim and other appeals* [2015] 4 MLJ 34 at p 47 further clarified the issue on conviction for criminal offence in civil proceedings where it said:
- In civil proceedings, ss 52 and 55 are the relevant provisions. Under these two provisions, conviction for criminal offence is not relevant as evidence of bad character.

[24] With regard to further allegations that the proposed contemnor did not obtain a Doctor of Philosophy in Social Science with System Analysis Concentration and not a Fellow of the British Computer Society as claimed in his Curriculum Vitae (CV), the court finds that these allegations were only raised in the plaintiff's supplementary affidavits and based on the decision in the case of *Tan Sri Dato' (Dr) Rozali Ismail & Ors* the supplementary affidavits cannot be allowed to supplement the statement where the Federal Court clearly states at para 29:

It is settled that committal proceedings are criminal in nature since it involves the liberty of the alleged contemnor. Premised upon that, the law has provided procedural safeguards in committal proceeding which require strict compliance ...

[25] In the circumstances, any failure to comply with the requisite procedural requirements is fatal as it is clear that, any deficiency in the statement cannot be supplemented or cured by any further affidavit at a later stage. Therefore, based on the above-mentioned, the statement made by the plaintiff that the proposed contemnor is required to disclose any circumstances that may give rise to doubts regarding his integrity and/or credibility as an expert based on his Curriculum Vitae (CV), ie to include the proposed contemnor's criminal conviction in this case, in the opinion of the court is without any basis and plainly wrong as there is no requirement under the law for the same to be disclosed by an expert witness in his expert report.

[26] Accordingly, the ex parte order dated 2 April 2019 granted leave to the plaintiff by the court to commence committal proceedings against the proposed contemnor is therefore set aside with costs of RM3,500 to be paid by the plaintiff to the proposed contemnor.

Application to set aside ex parte order was allowed with costs of RM3,500 paid by the plaintiff to the proposed contemnor.

Reported by Mohd Kamarul Anwar

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